IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, THE EXECUTOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICI CURIAE ON CERTAIN LIMITED POINTS.

LELAND K. NEEVES,
WINFIELD T. DURBIN,
Amici Curiae.

SCOTT, MACLEISH & FALK,
Of Counsel.

October, 1948.

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This brief, with the written consent of counsel for both parties, is filed by the undersigned as *Amici Curiae* on behalf of the Estate of William Bloss Lloyd, deceased, against which an estate tax liability has been asserted.

While the deficiency assessed against the Lloyd estate is based on the inclusion in the gross estate of several trusts, the problems presented are illustrated by the largest trust, created in 1923, in which the decedent reserved a contingent life estate (in the balance of the income after certain annuities) which would take effect if he survived his wife who was given an immediate life estate and in which

the Commissioner will contend, we believe erroneously so under Illinois law, that there was a remote possibility of reverter by operation of law. The trust was to terminate on the death of the last survivor of decedent, his wife and his former wife. His wife survived him so that the trust did not terminate on his death and the interests of the beneficiaries did not become determined at that time and decedent's reserved life estate never took effect.

These facts suggest a variation from the facts in the *Speigel* and *Church* cases which, it is respectfully submitted, the Court should consider in reaching a correct decision in the two cases presently before it and in considering the nine questions asked of counsel. A chief purpose of this brief is to call the Court's attention to the extreme danger in overruling earlier decisions like *Reinecke* v. *The Northern Trust Company* and *May* v. *Heiner* without giving the most careful consideration to the consequences of its action, and to the salient fact that if those cases are overruled it becomes a matter of great difficulty, if not impossibility, to draw a line short of taxing all long-term *inter vivos* trusts.

Our argument will be directed to some extent to all of the nine questions on which the Court requested reargument in its order of June 21, 1948, but will attempt merely to present certain views not otherwise covered by other counsel. Even within this scope, the present brief is not in any manner a complete presentation of the points touched upon, this being the result of the necessary limitations of time and self-imposed limitations as to length.

ARGUMENT.

I.

The Reinecke Decision Should Be Adhered to On Its Merits, and the Hallock Case Should Be Properly Limited.

The decision in *Reinecke* v. *The Northern Trust Company*, 278 U. S. 339, has been properly regarded as establishing the requirement for the imposition of the tax under Code Section 811(c) that the decedent must retain some economic benefit in the trust estate. While the case is not referred to by name in the nine questions, it furnishes the answer to the first, sixth, eighth, and ninth questions, so that the Solicitor General regards these questions, or some of them, as questioning the validity of the decision.[1]

The *Reinecke* case, as so interpreted, was a sensible construction of the statutory provision taxing transfers "intended to take effect in possession or enjoyment at or after * * * death."

The words "at" and "after" are used together in the statute, and a holding that a trust can be taxed merely because it terminates at death and the beneficial interests are then fixed, leads to the problem whether a trust may be taxed if it was to terminate, or would probably terminate, after death. Since the imposition of the tax in the latter situation would mean the taxing of all long-term

1—An examination of the actual facts as to the trust involved in the *Reinecke* case will show that it was not exactly one to terminate on death and the case is to this extent distinguishable from the *Spiegel* and *Church* cases where the trusts were to terminate on death. In the light of the following discussion it will be seen that this affords an additional reason for not overruling the *Reinecke* case on its facts.

trusts, it seems plain that the statute was not to be taken literally, as was contended by the Government.

The set of facts in the *Spiegel* and *Church* cases, where the trust terminated on the death of the donor, offer, from the point of view extending the application of the tax, a tempting first step beyond the requirement of the retention of economic benefit. The Court should ask itself, however, what would be done with cases where other lives measure the duration of the trust, and it does not terminate on death, and in this connection the facts as to termination in *Fidelity Company* v. *Rothensies*, 324 U. S. 108, *Commissioner* v. *Field Estate*, 324 U. S. 113, and *Goldstone* v. *United States*, 325 U. S. 687, should be considered, and should be contrasted with the statement at the top of page 25 of the Solicitor General's brief on reargument.[2]

The Commissioner's Regulations which are set out at page 64 in the Solicitor General's brief on reargument, set up two requirements for the application of the above statutory phrase, as follows:

> "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> "(2) the decedent or his estate possesses any right or interest in the property * * *."

It must be noted that the first requirement, as stated, is not that the interests of the beneficiaries be determined on decedent's death, but the language can at least be construed, and the Commissioner has construed it in

2. On page 25 of the Solicitor General's brief it is stated: "If the death of the decedent is the event which determines not only the time when the ultimate taker will enter into actual possession or enjoyment but also determines who that taker will be, the ultimate possession or enjoyment of the property has been suspended until the decedent's death * * *". The three decisions of this Court would not appear to satisfy the requirement for the imposition of the tax as here stated.

practice, as covering cases where, although the beneficiaries must survive the decedent, they must also survive the expiration of a period, perhaps determined by the lives of others, extending beyond the death of decedent. As so interpreted and applied, it is submitted that the Regulation goes beyond the proper scope of Section 811(c) and the *Hallock* case in taxing transfers where the death of the decedent does not cut off the decedent's possibility of reverter, or cause the decedent's interest to pass to the trust beneficiaries, but instead passes decedent's reversionary interest to his estate under his will. In the *Hallock* case, on the other hand, while the trusts were not to terminate on death, the situation was essentially the same and the facts were in substance a gift to A for life, with distribution of the principal on the death of A to the settlor, if living, and if the settlor were dead, then to B. The death of the settlor was the event which shifted the entire remainder interest from the settlor to the beneficiary. The Regulations would impose a tax on the entire trust under 811(c), where only the value of the reversionary interest, which is an asset of the settlor's estate, should be taxed under 811(a) rather than 811(c). In the case of trusts which terminate on the death of the last survivor of the settlor and other persons, where the trust continues after the settlor's death and he has merely a reversionary interest to himself or his estate if the beneficiaries fail to survive the termination of the trust, his death is not the "intended event" which "gives valuable assurance" to the beneficiaries or the "generating source of their title."

The *Hallock* case further, instead of being inconsistent with the *Reinecke* case, reiterates the rule as to the necessity of the retention of substantial economic benefit. The reversionary interest there was actual and substantial, and the tax was made to depend upon it. The court said:

"Whether the transfer made by the decedent in his

lifetime is 'intended to take effect in possession and enjoyment at or after his death' by *reason of that which he retains* is the crux of the problem."

Furthermore the quotation must be construed with specific reference to the facts before the court and the thing actually retained. As stated above this was the entire remainder interest after the life estate, which the settlor's death extinguished and passed to the other trust beneficiary or beneficiaries.

It being apparently assumed that the *Hallock* case will be applied to remote reverters arising by operation of law, the Solicitor General in his brief on reargument declares that adherence to the *Reinecke* case makes the imposition of the tax turn upon the technicality of the existence of an economic interest of little practical consequence. While the observation is true, the anomoly is to be avoided by restricting the application of the *Hallock* case to transfers truly effected by death and having in mind the requirement that the retained interest be substantial from a practical point of view, and that the language of Section 811(c) places the imposition of the tax upon a required *intention*.

If the requirement of the passing of economic benefit on death is eliminated, the crucial problem as to the imposition of the tax under Section 811(c) will turn upon the requirement of the transfer being conditioned on death. If the requirement should be approved in the manner in which it is stated in the Regulations, the imposition of the tax would, in the first place, turn upon nice and subtle questions as to whether the interest of the beneficiary is vested subject to being divested not just by the death of the beneficiary, but by the death of the beneficiary plus some other condition, such as the survivorship of a substituted beneficiary. If the interest of one of the children in the *Speigel* case was vested subject only to being di-

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Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This petition for rehearing is filed by respondent pursuant to Rule 33 of this Court because of the public importance of the decision of this Court rendered January 17, 1949.

By repudiating the authority of four unanimous decisions of this Court rendered in 1930 and 1931 and by distinguishing two unanimous decisions of this Court rendered in 1938, this Court has required this respondent to pay an estate tax from which others similarly situated over the past eighteen years have been immune. This result has been achieved notwithstanding the fact that Congress, fully aware of the doctrine of *May* v. *Heiner* and of the limited scope of

vested in favor of other living beneficiaries, so that the interest might remain as an asset of the child's estate even though he predeceased Speigel, then the requirement, as stated in the Regulations, would not be satisfied. Yet, on the other hand, the requirement would apparently be satisfied by a trust to last until the death (or a number of years after the death) of the last survivor of a large number of persons, provided merely that the settlor is named as one of the persons. The imposition of the tax might turn upon the rather accidental factor of whether the draftsman in stating the lives measuring the Trust as including, for example, all of the grantor's descendants, happens to include the grantor's life. And any long term trust might be taxed on the view that it would obviously last beyond death.

II.

The Doctrine of May v. Heiner Should Be Adhered to On Its Merits as Not Inconsistent With the Hallock Case.

The three *per curiam* decisions handed down March 2, 1931 which were the subject of the Joint Resolution the following day, and which are popularly embraced in the references to *May v. Heiner*, adopted a plausible construction of Section 811(c), even though it might afterwards appear that the construction was not what Congress had intended. The defense of these decisions is ably presented in the briefs of counsel for the Church estate and other *amici curiae*. The decisions were not required on one view of the *Reinecke* doctrine since economic benefit in the property as a whole was retained, but they are consistent with a logical interpretation since the particular interest which the beneficiaries received, being the remainder after the life estate, was not retained by the grantor and did not pass on his death. The actual interest retained in the

the joint resolution of March 3, 1931, has made no effort in almost eighteen years to broaden the law to the scope which this Court has belatedly accorded it.

The additional revenue which the Treasury will receive as a result of the action of this Court must be deemed insignificant by the Treasury since it has made no effort to get Congress to change the law and since, even before the present decision of this Court, the doctrine of *May* v. *Heiner* was available only to decedents who had established trusts with reserved life estates more than seventeen years ago.

Counsel for the petitioner suggested to this Court at the reargument that, even if petitioner were to prevail on the ground on which it has now prevailed, the Commissioner of Internal Revenue might be expected to issue a general ruling which would accord to the estates of all who had died before the decision of this Court in the *Church* case the same immunity from taxation which has for almost eighteen years been accorded those who could bring themselves within the rule of *May* v. *Heiner*. The Commissioner has done that on previous occasions in tax cases. If this possibility materializes, the Church estate, because it had the misfortune to be selected, not by the government but by this Court, as the test of the vitality of *May* v. *Heiner*, will be subjected to a heavy levy from which all taxpayers similarly situated will be exempt. Such is the danger and injustice inherent in overruling long standing and thoroughly considered tax decisions of this Court.

The petitioner never raised in any court the point on which this case has been adjudicated, although *Hallock*, if it be deemed to foretell the result here, was four years old when this case was tried in the Tax Court. In *Fidelity Co.* v. *Rothensies* (324 U. S. 108) and in

per curiam decisions did not pass on death, but expired. The decisions with perhaps the exception of the holding in the *McCormick* case on the actual facts there involved were thus consistent with the *Hallock* case where the actual interest retained by the decedent passed on his death. (See I above.)

The thought behind the exclusion of the outstanding life estate in the Hallock situation is in the last analysis the same as the thought behind the 1931 decisions—that only the interest which passes from decedent to his donees by reason of his death, not the entire property transferred by him, is to be taxed. This view, consistent with the character of an estate tax, prevents incongruous results such as the taxation of an entire trust because of some minor right or privilege, although such incongruous results should also be prevented by an adherence to requirements as to the intention of the donor.

III.

The Actual Decision in May v. Heiner On the Facts in That Case, at Least If the Life Estate Is Taken as Not Having Come Into Possession, Was Correct as to the Law Prior to March 3, 1931 and Should Be Followed Even as to Trusts Created After the 1932 Amendments to Section 811(c).

Questions 4 and 5 which refer to *May* v. *Heiner*, mention the "*May* v. *Heiner* interpretation" indicating that the Court had in mind the distinction between the actual decision in the case and the interpretation of Section 811(c) which is popularly thought of as having been handed down in the case, but was in fact contained in the three *per curiam* decisions of March 2, 1931. *May* v. *Heiner* was decided April 14, 1930. The settlor-decedent, Mrs. May, conferred an immediate life estate on her husband reserving

Commissioner v. *Estate of Field* (324 U. S. 113), which prior to *Church* and *Spiegel* were probably the most important estate tax cases decided by this Court in a period of eight years, the taxpayers, who had lost below, were granted a most limited review by this Court. They were not permitted to argue here every point of law which had been raised below. In *Church*, on the other hand, the government, which lost twice below, has been invited by this Court to litigate an issue which was never presented for the consideration of either of the lower courts although this Court says that the importance of the issue was clearly apparent from what this Court said in *Hallock*.

Respondent does not contend that this case has not had the thorough consideration of this Court. Nevertheless respondent presents this petition for rehearing in the hope that the Court will again consider what it has done and review the precedent which it has established in overruling old and thoroughly considered authorities when no constitutional issues are involved and when the additional revenues to be anticipated by the Treasury are insignificant to the United States although a heavy burden upon those who must pay.

For all the foregoing reasons respondent respectfully prays that this petition be granted and that the judgment of this Court be upon further consideration reversed.

Respectfully submitted,

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent,

By WILLIAM W. OWENS,
Attorney for Respondent.

Dated: January 31, 1949.

a contingent life estate to herself dependent upon her surviving him. It appears inferentially from the record and was stated by taxpayors' counsel in their briefs that she predeceased him, and her life estate accordingly never came into possession. The court said that the record was not clear, but that it did not matter who survived. The Government's brief in *Burnet* v. *The Northern Trust Company* explained the case on the ground that the Court felt that whatever the situation might be as to an immediately reserved life estate, the tax would not be imposed where a contingently reserved life estate came into effect because the intention of the settlor was different in reserving a contingent life estate than in reserving an immediate one.

The three *per curiam* decisions were handed down approximately a year after *May* v. *Heiner*, and the joint resolution was drafted, introduced and enacted, all on the day following the three decisions. In the intervening year no legislative action was taken with respect to *May* v. *Heiner*. The three subsequent decisions involving a present life estate were the ones which "came almost like a bombshell because nobody ever anticipated such a situation" in the language of Senator Smoot, quoted on page 36 of the Solicitor General's brief on re-argument. The Commissioner's briefs in the three cases sought to distinguish *May* v. *Heiner* rather than to attack it.

It is submitted that in any present consideration of the question of the effect of a reserved life estate, the court should keep in mind the three different situations where:

1. The life estate is immediately reserved.

2. The life estate is contingently reserved but comes into possession before death, and

3. The life estate is contingently reserved and never comes into possession.

In a situation of the contingently reserved life estate,

the decisions of the lower courts are in conflict as to whether the tax is to be imposed even with respect to trusts created after the 1932 amendments to Section 811(c), and clearly the better view, as decided by the Tax Court in *Estate of Curie*, 4 T. C. 1175, and followed in *Nathan*, 6 T. C. 605, is against the tax, and the decision the other way on appeal in the *Nathan* case in the Seventh Circuit, 159 Fed. 2d 546, is not convincing. The Tax Court view would appear to be compelled by the Committee reports.

The report of the House Committee on Ways and Means, 72nd Congress, First Session, pages 46-47 (C. B. 1939-1 page 490) in describing the changes proposed at that time and subsequent to the 1931 Joint Resolution, stated that the insertion of the words "or for any period which does not in effect end before his death" was intended to reach a situation where the decedent "is to have the income from and after the death of another person until his own death *and such person predeceases him.*" The report states that this was regarded as clarifying the Statute, apparently as amended in 1931. If there is serious doubt that such trusts are taxable under the new language, it should be beyond question that they were not reached by the language prior to 1931.

IV.

Reinecke v. Northern Trust Company and May v. Heiner Should Not Be Overruled By the Court at This Late Date.

We respectfully urge that the question at this point is not so much as to whether *Reinecke* and *May* v. *Heiner* would have been decided in the same manner were those cases now before the court for the first time, but it is rather as to whether, after a lapse of nearly twenty years, they

should be overruled where it appears that if they are overruled great damage will be done to estates now pending, and gross discrimination will have been brought about between estates which have been heretofore closed and those that are still open merely because of the fortuitous circumstance that the settlor in estates now open deferred his death until the last few years and after *Hallock* was decided.

The present situation is squarely within the views of this Court as expressed in *U. S.* v. *South Buffalo Railway Co.*, 333 U. S. 771, 774, decided April 26, 1948, where the Court said:

> "It is the Government's contention that the *Elgin* decision [*U. S.* v. *Elgin, Joliet, etc. R. Co.*, 298 U. S. 492] misconstrued the Act, misunderstood its legislative history and misapplied the Court's own prior decisions. It is not necessary in the view we take of the case to decide to what extent, if any, these contentions are correct. It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved. But we do not write on a clean slate. What the Court has written before is one of a series of events, which convinces us that its overruling or modification should be left to Congress. As the Court held on our last decision day, when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. *Massachusetts* v. *United States*, 333 U. S. —, decided April 19, 1948. Moreover, in this case, unlike the cited one, Congress has considered the alleged mistake and decided not to change it."

The Court will keep in mind that the Government's lien for taxes continues for a considerable period after death and attaches to all property included in the gross estate. Here again, even in the case of closed estates, unwitting beneficiaries may be held liable for burdensome taxes even

in cases where by lapse of time and subsequent death they are unable to pay or can not obtain just contribution from others equally liable.

In the reserved life estate situation it is apparent that, in view of the Congressional action in 1931, there is no good reason for overruling *May* v. *Heiner*, and the only effect thereof is to penalize pre-1931 trusts which happen now to be open, or pending, or with respect to which the settlors therein are still living. The Joint Resolution overcame the views of this Court as to trusts thereafter made. And this Court, in the light of the detailed and thorough briefs upon the subject, particularly on the part of the Government (*Hassett* v. *Welsh*, 303 U. S. 303), refused to apply the Joint Resolution to trusts created prior thereto. There is no live or current issue left and the court would only be reaching back into the past.

In the reserved life estate case, those estates will be penalized where trusts are created before 1931 and the decedent has died recently; these being the cases where there is presumably, in general, a smaller element of contemplation of death than in the case of persons who died during the intervening years and more shortly and after having created their trusts.

The progress of the tax law against taxpayers inevitably gives advantages to those who make transfers before the law becomes settled against them. The situation of those who created pre-1931 trusts with income retained and whose estates are open for the imposition of the tax is a relatively trivial part of the larger whole. The dollar amounts of tax involved, while significant to the estates affected, are not significant to the national revenue. If the imposition of the tax should have been regarded as a possibility when the trusts were created, at least subsequent estate planning was made on the assumption that they were not taxable and the

settlors have died and will die without power to alter or recall transfers.

The settlors in the reserved income cases could have made complete gifts and defeated the estate tax. The life estates retained were not of benefit to the settlors at the expense of the Treasury, but rather the matter was one between the settlors and the objects of their bounty. The income retained is taxable to the settlors in their top income surtax brackets which serves as a *quid pro quo* for the retention. The Treasury collects the income tax but not the estate tax and one of the two taxes is all that is collected in the case of outright gifts. Freedom from the estate tax is not an unreasonable consequence of placing the remainder interest beyond the power of the decedent.

So far as *Reinecke* is concerned, where the settlor retained no economic interest in the trust estate, Congress has failed to make any statutory change which will overcome that decision, contrary to what it did in the case of reserved life estates by the Joint Resolution of March 3, 1931. The Government's brief on reargument stresses the fact that this Court practically from the outset has construed the estate tax to be a tax upon the transmission of an estate rather than upon its receipt, and no good reason is apparent as to why this Court should now depart from that conception of the tax. Therefore, even if it were thought, if the question were now to be decided for the first time, that the mere fact that the settlor's death is the event which fixes the rights of the beneficiaries is sufficient for the imposition of the tax, still in the absence of Congressional action and its necessary acquiescence in the decision, this Court should not now destroy that decision.

The argument has been advanced by the Commissioner that Sec. 811(c) should be given broad application to tax substitutes for testamentary disposition. But it must be conceded that an outright gift would not be so taxed, and

it would seem that *inter vivos* trusts of the sort in question, being beyond the power or personal benefit of the settlor, more nearly resemble outright gifts than transfers by will. It seems inequitable to subject the settlor to the same tax at the same rates as if he had kept the property and all its benefits. (Tax evasion is not involved where the bundle of rights which are the occasion for the tax are given up but only where the giving up is a sham and they are in fact retained.) In any event it is plainly unjust to do so retroactively as to completed transfers beyond control or recall.

It is an insufficient answer to the above that the trust may have been created before the *Reinecke* or *May* v. *Heiner* decision, so that the settlor could not have relied on it. Assuming that the settlor in legal contemplation assumed the risk of the tax, the estate tax in the 1920's was only a token tax by present standards and was used principally to induce the states to adopt inheritance tax statutes. The rates were trivial by present standards. The size of the tax as well as its philosophy was so changed in the 1930's as to make it in effect a new tax designed to take for the Government the greater part of substantial estates and a large part of modest ones. Settlors in the 1920's were not on notice and could not have expected the enactment of such a new tax and its application to their transfers.

The principal trust involved in the Lloyd estate was created in 1923. The inclusion of the 1923 trust will result in increasing the decedent's gross estate by the sum of $2,099,975. The resultant tax on that inclusion alone would be approximately $1,200,000. The overruling of these long established decisions and the resultant burdening of this estate with that amount of tax, would be a discrimination against this estate, as compared with estates in which the decedents had executed similar trusts, but which were

closed long before, which would be free from tax, merely because of the fortuitous circumstances that William Bross Lloyd did not die until 1946. It would discriminate against Lloyd, Spiegel & Church as compared with persons who retained ownership of their property until death.

With specific reference to the sixth and eight questions asked by the Court, a disposition of property without the reservation of substantial economic benefit or power to alter or affect the beneficial interests is for one thing fundamentally different in character from a testamentary disposition. The essential characteristic of a testamentary disposition is that it is ambulatory and subject to the decedent's control. In the case of a completed transfer, the retention of management powers by the decedent and recognition of family benefits should not lead to the extension of Section 811(c) to tax the transfer, at least in the absence of explicit Congressional action. Even in the income tax field it may be said as a generalization that *Helvering* v. *Clifford*, 309 U. S. 331, has not been extended by the Courts to long term trusts without the retention by the settlor of power to alter the beneficial interests.

Even where power to alter the beneficial interests has been retained, Congress has recognized the harshness of the imposition of the income tax on the settlor where he is without power to relieve himself of the tax except by surrendering his power and control and where such surrender may result in the imposition of a gift tax pursuant to *Sanford* v. *Commissioner*, 308 U. S. 39 contrary to the probable expectation of the settlor who may have believed in creating the trust that he was then making a completed gift and would free himself from income tax. To this end Congress twice enacted a relief provision, appearing first as Section 502(a) of the Revenue Act of 1943 adding Section 1000(e) to the Code and later as a part of Public Law 112 80th Congress (1947), in each case giving settlors

a certain period within which they could surrender their powers without gift tax.

In other words, the tax payers were told that they could keep their powers and pay the income tax or they could release their powers and avoid the income tax without unfavorable tax consequences.

It appears that these enactments must also be construed as having offered to tax payers releasing their powers immunity from an estate tax on the ground that the release was in contemplation of death and it was apparently supposed and recognized that the release would in many cases, in eliminating the power to alter the beneficial interests, free the trusts from estate tax as well as gift tax. This would appear to be in recognition of the proposition that where Court decisions, contrary to the taxpayer's expectation, place the imposition of the tax on possession of certain privileges and at greatly increased rates, the taxpayer should be afforded a choice between the privileges and the tax.

If the retention of management powers as trustee were made the determining factor in the imposition of the tax, the settlor if still living could resign as trustee and might escape the tax in this manner. Settlors who are no longer living, however, would be less fortunate. And if the tax were imposed independently of the existence of management powers there would be nothing which the settlor could do to relieve himself of the estate tax burden.

Accordingly, it is submitted that any such decision of the Court would have the vice of judicial legislation in its operation retroactively on past transfers and would place upon Congress the burden of affording some sort of relief in cases of already completed transfers. It would seem preferable that the extension of the tax to such transfers should be left to Congress.

The Court accordingly should adhere to the former decisions.

The Court could, if it saw fit, say about the *Reinecke* decision what the Court said about the *Elgin* decision in the *South Buffalo* case. In that event there might be a warning to future settlors that they might be subject to tax. To go beyond this and by overruling the cases discriminate against the estates of certain decedents would appear to be without justification.

Respectfully submitted,

LELAND K. NEEVES,
WINFIELD T. DURBIN,
Amici Curiae.

SCOTT, MACLEISH & FALK,
Of Counsel.

October, 1948.